No. 10148

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. G. BOSWELL COMPANY AND CORCORAN TELEPHONE EXCHANGE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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This reply brief is submitted in response to the few new matters raised in respondents' voluminous brief. Before considering the specific contentions, however, it should be pointed out that respondents, in complete disregard of the Board's findings on controversial issues of fact, have set forth in their brief a weighted narrative of the evidence with a plea that this Court "pass upon the credibility of witnesses and the weight * * * of their testimony" (Br., p. 209). The Board has carefully considered and weighed all the evidence, and whether the Board in so doing should have believed respondents' witnesses and rejected all contrary evidence, as respondents contend, is, of course, not within the scope of this review. We now turn to a consideration of specific contentions made by respondents.

1. The contention that the Board's order is unenforceable as to Powell because of his criminal record

Respondent Boswell Company contends (Br. pp. 158–159) that it should not be required to reinstate Powell, even though he may have been discriminatorily discharged, because of his conviction for two felonies prior to his discharge. The record however shows that Powell's criminal record "was common knowledge among the people here, and everybody in the county knew about" it (R. 3195). In fact respondent Boswell was well aware of it as early as the spring of 1938 (R. 3194–3196); yet it chose to retain him in its employ until the evictions in November 1938. Under these circumstances, respondent cannot in good faith now urge Powell's earlier misconduct as a basis for its refusal to reinstate him. *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. (2d) 849, 855–856 (C. C. A. 7), cert. den. 312 U. S. 680; *N. L. R. B.* v. *Gamble Robinson Co.*, 129 F. (2d) 588, 592 (C. C. A. 8).

2. The contention that the Association was not a party to the proceedings

Respondent Boswell contends (R. 180–181) that the Board's order with respect to the Association is invalid because it was not a party to the proceeding and did not appear therein. This contention is erroneous both in fact and in law. The Association was duly served with the fourth amended charge, the complaint, and the notice of hearing (R. 28–29, 500–501), but did not desire to intervene or be represented by counsel (R. 695). Having received due notice and an opportunity to be heard, the Association was accorded all

the rights to which this Court stated it was entitled. *N. L. R. B.* v. *Sterling Electric Motors,* 109 F. (2d) 194, 210 (C. C. A. 9). Moreover, the Association was not a necessary party to the validity of the Board's order. *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 361–365; *N. L. R. B.* v. *Indiana & Michigan Electric Co.,* 124 F. (2d) 50, 54 (C. C. A. 6).

3. The contention that the Board had no jurisdiction to entertain the charge with respect to Mrs. Dunn

Respondent Exchange contends (pp. 233–237) that the Board had no jurisdiction to consider Mrs. Dunn's case because it did not appear that she authorized Organizer Prior to file a charge on her behalf or was a member of any labor organization with which Prior was connected. This contention is plainly without merit, as the Board found (R. 504, n. 4).

Section 10 (b) of the Act, which provides for the filing of charges, while it makes such filing a jurisdictional requirement,[1] is otherwise wholly without limitation.[2] The Board's Rules and Regulations (Article II, Section 1) accordingly provide that charges may be filed "by any person or labor organization." These rules have been uniformly interpreted by the Board so as not to restrict the class of persons or organizations qualified to file charges. *Matter of Penn-*

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[1] *N. L. R. B.* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 101 (C. C. A. 2); *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 369.

[2] Section 10 (b) provides as follows:

> Whenever it is charged that any person has engaged in or is engaging in any * * * unfair labor practice, the Board * * * shall have power to issue * * * a complaint * * *.

sylvania Greyhound Lines, Inc., 1 N. L. R. B. 1, 45 (1935), Board's order enforced, 303 U. S. 261, 272; *Matter of Superior Tanning Co.,* 14 N. L. R. B. 942, 945 (1939) (Board's order enforced with modification, 117 F. (2d) 881, 883 (C. C. A. 7), cert. denied 313 U. S. 559); *Matter of Jefferson Lake Oil Co., Inc.,* 16 N. L. R. B. 355, 356 (1939); cf. *Matter of Vincennes Steel Corp.,* 17 N. L. R. B. 825, 826–827 (1939) (Board's order enforced with modification, 117 F. (2d) 169, 170–171 (C. C. A. 7)); *Matter of Inland Lime & Stone Co.,* 24 N. L. R. B. 758, 759 (1940) (Board's order enforced, 119 F. (2d) 20 (C. C. A. 7)). The validity of the Board's practice in this respect was vigorously contested in the *Pennsylvania Greyhound* case, *supra,* where, as here, the employer contended that the proceedings were defective because the charging party allegedly had no interest in the proceedings (Employer's Brief, pp. 2–8). The Government asserted, to the contrary, that the Board's jurisdiction was not affected by the extent or the existence of the charging party's interest in the proceeding (Government's Brief, 53–55). The Supreme Court enforced the Board's order; without specifically referring to this issue, it stated that "we have considered but find it unnecessary to comment upon other objections to the order of less moment" (303 U. S. at p. 272).

Respondent places its sole reliance on the decision of the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Indiana & Michigan Electric Co.,* 124 F. (2d) 50. We submit that that decision is not consonant with

the Act or the foregoing authorities. The Government's petition for certiorari to reverse that holding has been granted (316 U. S. 657), and the case was argued and submitted to the Supreme Court on November 13 and 16, 1942, where it is now pending decision.

4. The contention that respondents were not afforded a fair and impartial hearing

Respondents' contention (Br. pp. 242–248) that the Trial Examiner was biased and prejudiced and conducted the hearing in an unfair and impartial manner, is wholly lacking in merit. Specifically, respondents complain that the Trial Examiner (a) "displayed animosity" toward, and "threatened to bar," respondents' counsel from further participation in the hearing "without any reason, cause or justification" (Br. p. 242–243), (b) showed a hostile attitude toward respondents' witnesses and cross-examined them (Br. pp. 243–246), (c) made improper off-the-record statements (Br. p. 246), (d) favored the Board's attorney in ruling on motions and admissibility of evidence (Br. p. 247), (e) permitted the Union organizer to sit at the table with Board's counsel and participate in the proceedings (Br. p. 247), and (f) was prejudiced in finding against respondents in the intermediate report (Br. pp. 247–248). All these claims are without basis.

(a) The record plainly indicates that the Trial Examiner at all times endeavored to conduct the hearing in an orderly and impartial manner but was prevented from so doing by respondents' counsel, who assumed improper liberties and completely disregarded

the usual and ordinary rules of conduct and procedure. The constant interruptions by and arguments of respondents' counsel, not only toward witnesses but also with respect to the Board's counsel and the Trial Examiner,[3] and other plainly improper actions,[4] evoked a few manifestly justified protests on the part of the Board's counsel and the Trial Examiner (e. g. 857, 1082–1084, 1115–1117, 1141–1143, 1146–1149, 1220–1221, 1299–1302, 1417–1419, 1454, 1476–1478, 1551–1553, 1580–1583, 1887–1888, 2472, 2733–2734, 2763, 2743–2744, 2791–2793, 3231–3236), to some of which the respondents now object. During the hearing, counsel for respondents frequently recognized the justice of such protests by offering to "keep still" (R. 2472), by admitting that they had engaged in interruptions (R. 2505, 2928), and by apologizing on several occasions, once "for losing my temper" (R. 3234, 2537, 774, 1434).

[3] See, e. g., R. 701, 702, 710, 767, 770, 808, 814, 823, 827, 832, 834, 836, 841, 843, 848, 879, 881, 889, 891, 900, 945, 989, 990, 996, 999, 1000, 1006, 1014, 1061, 1065, 1071, 1081–1084, 1115–1117, 1120, 1143, 1146–1149, 1186, 1208, 1214, 1219, 1220, 1248, 1268, 1271, 1283, 1299–1303, 1323, 1348, 1374, 1380, 1394, 1418, 1425, 1430, 1440, 1449, 1450, 1469, 1511, 1551–1553, 1563, 1573, 1580–1583, 1604, 1613, 1651, 1705, 1726, 1729, 1750, 1787, 1845, 1868, 1874, 1879, 1881, 1885, 1887–1888, 1891, 1896, 1901, 1912, 1916, 1968, 1989, 2012, 2071, 2139, 2141, 2166–2167, 2180, 2195, 2202, 2249, 2269, 2294, 2348, 2370, 2404, 2472, 2475, 2499, 2503, 2504, 2510, 2518, 2520, 2523, 2541, 2540, 2598, 2683, 2687, 2693, 2698, 2701, 2719, 2733–2734, 2739, 2754, 2763, 2790, 2791–2793, 2800, 2802, 2820, 2834, 2874, 2913, 2914, 2918, 2925, 2928, 2931, 2939, 3059, 3137, 3177, 3180, 3231–3236.

[4] See, e. g., R. 1068, 1082, 1083, 1107–1108, 1115–1117, 1141–1143, 1149, 1122, 1283–1287, 1299, 1402, 1403, 1419, 1428, 1553, 1771, 2003–2006, 2405, 2406–2408, 2433, 2444, 2535, 2536, 2693, 2716, 2733, 2734, 2748–2749, 2763, 2766, 2767, 2777, 2844, 2902, 2906, 3137, 3138.

As the Third Circuit Court of Appeals stated in a similar situation in *N. L. R. B.* v. *Baldwin Locomotive Works,* 128 F. (2d) 39, 45 (C. C. A. 3), "the offender against due and orderly trial procedure was in reality respondent's trial attorney, whose apparent desire from the outset of the hearing was to goad the examiner into unjudicial words or conduct. * * * the examiner none the less exercised commendable restraint under the aggravating circumstances and proceeded with the hearing fairly and impartially to the conclusion thereof." See also *Bethlehem Steel Co.* v. *N. L. R. B.,* 120 F. (2d) 641 (App. D. C.).

(b) Respondents' contention that the Trial Examiner was hostile toward their witnesses and friendly toward the Board's witnesses, is neither borne out by the record as a whole nor by the specific instances mentioned in respondents' brief (Br. pp. 243–246).[5] The limited extent to which the Trial Examiner questioned the witnesses in this case was eminently proper and is not subject to criticism for any reason. Respondents' further assertion that in several instances the Trial Examiner questioned witnesses "for the obvious purpose of endeavoring to fortify" the

[5] "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made." *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. (2d) 641 (App. D. C.); *N. L. R. B.* v. *Condenser Corp. of America*, 128 F. (2d) 67, 70 (C. C. A. 3); *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), cert. den., 304 U. S. 576; *Jefferson Electric Co.* v. *N. L. R. B.*, 102 F. (2d) 949, 954–955 (C. C. A. 7); *Subin* v. *N. L. R. B.*, 112 F. (2d) 326, 332 (C. C. A. 3), cert. den., 311 U. S. 673; *Cupples Co., Mfrs.* v. *N. L. R. B.*, 106 F. (2d) 100, 113 (C. C. A. 8).

Board's case, and to "discredit" the witness or his testimony (Br. pp. 244–246), are wholly unsupported by the record references cited.

(c) Although respondents now object to all the off-the-record discussions (R. 246–247), only in two instances during the hearing did they request that such discussion be held on the record, one of which was granted (R. 860, 2241). In no instance following an off-the-record discussion did respondents' counsel object to any statements made off the record; nor did they seek at any time to restate on the record the substance of the off-the-record discussions, although these courses were always open to them (R. 695, 765, 766, 770, 772, 773, 815, 839, 881, 882, 949, 974, 1015, 1131, 1286, 1292, 1358, 1454, 1579, 1682, 1803, 1808, 1828, 1837, 1859, 2006, 2157, 2267, 2401, 2429, 2455, 2649, 2801, 2815, 2829, 2907, 3049, 3062, 3071, 3089, 3094, 3097, 3128, 3194, 3211, 3217, 3224, 3327, 3334).[6] Indeed, respondents themselves affirmatively approved or requested off-the-record discussions in several instances (R. 1828, 1837, 2815). Respondents offer no evidentiary support for their bland assertions that during such off-the-record discussions the Trial Examiner "made statements which clearly revealed his bias and animosity toward respondents, and se-

[6] That respondents did not hesitate to assert their view of the proper content of the record is amply demonstrated by their constant and proper requests for correction of the record, which the Trial Examiner facilitated and granted. See, e. g., R. 1276–1278, 1396–1397, 2456–2458, 2751–2753, 3043–3049, 3127–3132, 3200–3201, 3130–3132, 3214–3219, 3337–3340.

verely criticized counsel for the respondents without any cause therefore" and "became angry with counsel for the respondents."[7]

(d) The Court "need not consider" respondents' bald assertion that the Trial Examiner improperly favored the Board in his rulings on motions and objections to admissibility of evidence, "for the reason that [respondents do] not point to any single instance in the record supporting the assertion" *North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, 109 F. (2d) 76, 83 (C. C. A. 9).[8] Moreover, the Trial Examiner repeatedly accommodated respondents and in various ways sought to facilitate the presentation of their cases (see, e. g., R. 1523, 761, 838, 841, 844–845, 880, 902, 943,

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[7] Although respondents state that in at least one instance the Trial Examiner ruled on a motion during an off-the-record discussion, there is nothing to indicate that this occurred (R. 972–975). It is true that a motion was made and the discussion followed. However, it is a more reasonable assumption from the face of the record that respondents' counsel withdrew his question, as he did in numerous other instances (see, e. g., R. 1053, 1058, 1059, 1061, 1063, 1077, 1099, 1109, 1122, 1131, 1138, 1178, 1191, 1245, 1298, 1346, 1398, 1409, 1434, 1449, 1465, 1547, 1563). In any event, the entire incident in no way militated against respondents' right to bring forth their side of the case. *Subin* case, *supra*, 112 F. (2d) at 332; *Bethlehem Steel Co.* case *supra*, 120 F. (2d) at 651–652.

[8] But cf. e. g., R. 825, 841, 842, 858, 885, 891, 892, 893, 900 955, 956, 957, 961, 965–966, 1018, 1019, 1021, 1023, 1026, 1027, 1029, 1031, 1048, 1059, 1074, 1077, 1085, 1090, 1098, 1106, 1113, 1121, 1122, 1125, 1134, 1138, 1152, 1162, 1169, 1171, 1172, 1183, 1184, 1187, 1188, 1189, 1190, 1195, 1197, 1198, 1199, 1203, 1232, 1234, 1236, 1238, 1239, 1240, 1246, 1256, 1272, 1281, 1282, 1284, 1285, 1298, 1299, 1321, 1323, 1331, 1350, 1353, 1372, 1376, 1383, 1393, 1395, 1416, 1421, 1423, 1425, 1433, 1440, 1444, 1465, 1486, 1488, 1516, 1769, 1771, 2679, 2745, 2750, 2757, 2758, 2759, 2771, 2773, 2794.

961, 1051, 1067, 1084, 1169, 1178, 1226, 1253, 1275, 1276–1278, 1280, 1297, 1486, 1524–1525, 1977, 2049, 2056–2067, 2366, 2461, 2575, 2614, 2783, 2801, 2926, 2939–2940, 2991, 3075, 3080, 3181, 3193, 3206, 3257, 3322).

(e) The speciousness of respondents' contentions are graphically illustrated by their objection to the participation in the proceedings of E. F. Prior, the Union's business representative. Prior appeared as a party of record on behalf of the Union (R. 694). The Act and the Board's rules and regulations provide for such participation (Section 10 (b) of Act; Article II, Section 25 of Board's Rules and Regulations), which was in no respect prejudicial to respondents. *Consumers Power Company* v. *N. L. R. B.,* 113 F. (2d) 38, 42 (C. C. A. 6).

(f) Nor is there any merit to the contention that the Trial Examiner's prejudice is displayed by his conclusions and recommendations in his Intermediate Report. "Simply because the Examiner * * * failed to agree with the contentions of the Company in every instance does not convict [him] of bad faith or arbitrary conduct. [His] good faith in conducting the proceedings is further attested to by the fact that in [some of the charges he] agreed with the Company and absolved it of unfair labor practices." *N. L. R. B.* v. *Gallup American Coal Company,* 11 L. R. R. 415, 416 (C. C. A. 10), decided November 5, 1942 (R. 159–160).

That the actions of the Trial Examiner did not militate in any substantial manner against the right

of respondents to adduce their defenses, is borne out by the entire record and by respondents' failure to petition the Board or this Court for leave to adduce additional evidence under Section 10 (e) of the Act, as they should have done had they felt aggrieved. *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 226; *Jefferson Electric Co.* v. *N. L. R. B.,* 102 F. (2d) 949, 955 (C. C. A. 7); *Swift & Co.* v. *N. L. R. B.,* 106 F. (2d) 87, 91 (C. C. A. 10). Moreover, respondents failed to move to disqualify the Trial Examiner, "the effective means for eliminating bias and prejudice where, in fact, it is believed to exist." *N. L. R. B.* v. *Baldwin Locomotive Works,* 128 F. (2d) 39, 45 (C. C. A. 3); *N. L. R. B.* v. *Condenser Corp.,* 128 F. (2d) 67, 80 (C. C. A. 3); and see *Bethlehem Steel Co.* v. *N. L. R. B.,* 120 F. (2d) 641, 652–653 (App. D. C.).

5. The contention that the Trial Examiner erred in his rulings on admissibility of evidence

Respondents contend (Br. pp. 248–251) that practically all the testimony adduced by the Board was hearsay, that such testimony was improperly admitted, and that the Trial Examiner further erred in refusing to require the production of one of the earlier charges filed with the Board by Organizer Prior. Respondents are clearly in error as to what constitutes hearsay evidence, as is apparent from an examination of the record references cited in the margin.[9] Moreover,

[9] E. g., R. 817, 818, 821, 835–836, 837, 856–857, 859, 865, 866, 881, 883, 884, 885, 887, 888, 889, 894, 897, 898, 938, 942, 945, 947, 988, 990, 992, 993, 994, 995, 996, 997–998, 1000, 1005, 1006, 1007, 1008,

hearsay evidence is properly admissible in Board hearings. Section 10 (b) of Act; *N. L. R. B.* v. *Hearst,* 102 F. (2d) 658, 663 (C. C. A. 9); *Consolidated Edison Co.* v. *N. L. R. B.,* 95 F. (2d) 390, 395 (C. C. A. 2), aff'd 305 U. S. 197, 230; *N. L. R. B.* v. *Service Wood Heel Co., Inc.,* 124 F. (2d) 470, 473 (C. C. A. 1). Nor is there any merit to respondents' assertion that the Trial Examiner erroneously failed to require the production of the charge filed July 17, 1938. The ruling was clearly within the Trial Examiner's discretion. Cf. *Jefferson Electric Co.* v. *N. L. R. B.,* 102 F. (2d) 949, 954 (C. C. A. 7). Moreover, even if any of the Trial Examiner's rulings on the admission of evidence be regarded as erroneous, which we dispute, the errors were in no event prejudicial on any material issue; hence such error, if any, is not reversible. *Wilson & Co.* v. *N. L. R. B.,* 103 F. (2d) 243, 245 (C. C. A. 8); *N. L. R. B.* v. *Cities Service Oil Co.,* 129 F. (2d) 933, 936 (C. C. A. 2); *Subin* v. *N. L. R. B.,* 112 F. (2d) 326, 332 (C. C. A. 3); *N. L. R. B.* v. *Stackpole Carbon Co.,* 105 F. (2d) 167, 177 (C. C. A. 3), cert. den. 308 U. S. 605; *Bethlehem Steel Co.* v. *N. L. R. B.,* 120 F. (2d) 641, 651–652 (App. D. C.).

1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1218, 1219, 1220, 1222, 1247, 1248, 1250, 1251, 1269, 1271, 1273–1274, 1279, 1283, 1288, 1289, 1290, 1294, 1472, 1474, 1475, 1496, 1499, 1501, 1502, 1511, 1512, 1513, 1514, 1515, 1517, 1518, 1535, 1617, 1618, 1623, 1674, 1675, 1684, 1703, 1704, 1708, 1710, 1741, 1749, 1751, 1779, 1780, 1794, 1842, 1863, 1865, 1880.

CONCLUSION

It is respectfully submitted that the Board's order is valid in all respects and that its enforcement should be decreed.

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DECEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942